No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF REBECCA FRIEDRICHS AND FELLOW TEACHERS AND MIRANDA THORPE AND FELLOW CAREGIVERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

Twice in the past five years this Court has raised serious concerns about the holding in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). *Abood* held that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). Last term, this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016). This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public-sector agency fee arrangements be declared unconstitutional under the First Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Rebecca Friedrichs is a veteran public-school teacher from Orange County, California. Throughout her 28-year career, the government has forced her to fund the speech of the California Teachers' Association ("CTA") and the National Education Association ("NEA"), among others, simply because she is a public employee. Mrs. Friedrichs served as the lead plaintiff in a federal lawsuit, *Friedrichs v. CTA*, 136 S. Ct. 1083 (2016), which this Court considered last year. Her lawsuit asked this Court to overrule *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977), and safeguard public-sector workers' right to choose whether to fund union speech. Due to a 4 to 4 split, *Abood* survived, despite this Court's concerns about that decision's "questionable" and "err[oneous]" underpinnings. *Harris v. Quinn*, 134 S. Ct. 2618, 2632, 189 L. Ed. 2d 620 (2014). Mrs. Friedrichs is interested in this case because it presents the same question raised in her case. Moreover, her personal experiences show that when overruling *Abood*, the Court should craft its holding to require public employees' affirmative consent before government employers and unions may seize union dues from their wages. Otherwise, amici's experiences will become universal: unions will bully, harass, and isolate workers to prevent them from taking affirmative action to stop subsidizing union political speech. Mrs. Friedrichs' nationwide colleagues, Marguerite Gaspar, Katie Bowers, Christine Villalobos, Charles

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no party's counsel authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Friedrichs, Ruth Finnegan, Larry Sand, Scott Wilford, Barbara Amidon, Chalone Warman, Harold Warman, Irene Zavala, Harlan Elrich, Jade Thompson, Judy Bruns, Joseph Ocol, Karen Cuen, Victoria Marlene Heggem, Richard Blagden, Eileen Blagden, Kevin Roughton, Nick Koubsky, Norene Shephard, David Schmus, Jelena Figueroa, Matt Robertson, Ruth Boyatt, Eric Hanushek, Angela Stoner, and Laurann Pandelakis are teachers who have endured similar experiences and hope this Court will end unions' abusive and deceptive tactics.

Miranda Thorpe, Jean Freeman, Jack Zurlini, and Andrea Vangor are Washington caregivers whose rights were vindicated by this Court's decision in *Harris*. Their First Amendment rights were violated by operation of an opt-out scheme. These caregivers are uniquely well-positioned to show the Court what will happen should it vacate *Abood* but decline to clarify that dues seizures are constitutionally permissible only after an employee's affirmative consent.

The Freedom Foundation ("Foundation") is a nonprofit organization operating in Washington, Oregon, and California. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation currently focuses on public-sector labor reform, which it pursues through litigation, legislation, education, and grassroots activism. Since 2014, the Foundation has informed tens of thousands of *Harris*-affected workers of their First Amendment right to abstain from paying union dues. Based on its extensive *Harris*-related outreach, the Foundation has detailed knowledge about public sector unions' attempts to prevent workers from learning of and exercising their constitutional rights. The

Foundation's expertise in this area will assist the Court in properly crafting its holding in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should overrule *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In doing so, it should make clear that government employers and unions must obtain workers' affirmative consent before deducting any union dues or fees from their wages. This would prevent the use of "opt-out" schemes, which many public-sector unions have used for years to undermine workers' right to withhold funding for some union political causes. After *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014), unions representing partial-public employees implemented opt-out schemes to continue siphoning millions of dollars from caregivers and other *Harris*-affected workers. These schemes force workers to pay union fees until they affirmatively navigate an opt-out process. This substantially impinges workers' First Amendment rights. After all, constitutional rights undermined by deceptive schemes are no constitutional rights at all.

This Court has seriously questioned the constitutional legitimacy of opt-out schemes, acknowledging that they constitute substantial impingements on First Amendment rights and have been allowed to persist due to "historical accident[.]" *Knox v. SEIU 1000*, 567 U.S. 298, 313 (2012).

After this Court's decision in *Harris*, which declined to extend *Abood* to partial-public employees, many unions implemented opt-out schemes trapping thousands of workers who would otherwise have enjoyed, for the first time, a meaningful choice about union membership and support into dues payments. Overruling

Abood without addressing the need for workers' prior, affirmative consent would subject all public employees to the same abusive tactics. The First Amendment permits dues seizures *only after workers affirmatively consent to the payment of union dues*. Otherwise, even in the absence of compulsory union fees, workers' First Amendment rights are inevitably reduced to illusory guarantees. Mrs. Friedrichs' experience in public schools and the Foundation's outreach to *Harris*-affected workers makes this plain. The Court should overrule *Abood*, reinstating full First Amendment freedoms for America's public servants. In so doing, it should craft a holding that allows those public servants to meaningfully realize those freedoms.

ARGUMENT

I. THE COURT SHOULD OVERTURN *ABOOD*, HOLDING THAT THE FIRST AMENDMENT REQUIRES PUBLIC EMPLOYEES' PRIOR, AFFIRMATIVE CONSENT BEFORE UNION DUES MAY BE SEIZED FROM THEIR WAGES.

In *Harris*, this Court held that the First Amendment prohibits states from forcing partial-public employees to financially support a union at all. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). To evade *Harris'* holding, unions rapidly implemented comprehensive schemes to continue in practice what this Court prohibited in principle: seizing union fees from nonmembers without their consent. These schemes required public employers to seize full union dues from all workers in a bargaining unit automatically, *allowing* them to leave the union or "opt-out." However, the unions have not informed workers of their right to opt-out and have created procedural roadblocks to prevent them from doing so. These opt-out schemes have allowed

rampant abuse of non-members and negated the impact of this Court's decision in *Harris*. This abuse is not a mere policy concern, but rather an unconstitutional stifling of the right to free association. These abuses will continue if this Court does not specify that opt-out schemes violate the First Amendment.

This Court's decisions in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012), and *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007) all discuss the need for procedural safeguards to prevent the seizing of funds from a non-consenting state employee's paycheck for non-chargeable expenses. After this Court overturns *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), all public-sector union activities become non-chargeable expenses. Thus, the same procedural safeguards are necessary to prevent the seizing of *dues* from a non-consenting public employee's paycheck, just as they were necessary to prevent seizure of non-chargeable expenses prior to this case. Opt-out schemes lack such procedural safeguards and result in the misappropriation of workers' funds by unions.

A. For Decades, Teachers' Unions Across The Country Have Exerted Power Amassed Through Opt-Out Schemes To Abuse, Smear, And Discriminate Against Teachers Who Dissent From Union Political Orthodoxy.

Teachers have an unquestioned First Amendment right to resign membership in a union and become agency fee payers. See *Abood*, 431 U.S. at 233-36. Under *Abood*'s framework, public employees may decline union membership and pay a reduced agency fee that covers their pro-rata share of the union's collective

bargaining expenses, but not the union's overt political advocacy expenses. See *id.* at 235-36. *Abood* failed to recognize that, in the public sector, even collective bargaining is political speech. For public-sector employees, union activities like contract negotiations are inherently political expressions. *Abood* created more questions than it answered, as illustrated in the many cases where this Court has struggled to define the contours of what is chargeable and what is not. See, e.g., *Harris*, 134 S. Ct. 2618; *Davenport*, 551 U.S. 171; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Over the years, this Court has continually reigned in the schemes public-sector unions devise to maximize the extraordinary "legislative grace" they have been granted in some states to "tax government employees." *Davenport*, 551 U.S. at 184. The opt-out regime is the scheme public-sector unions utilize most often to deprive public workers of their First Amendment rights.

Mrs. Friedrichs' experience bears this out. With the help of an opt-out scheme, the CTA has prevented many teachers from exercising their *Abood* rights. For years, Mrs. Friedrichs has witnessed teachers fall for the "check the box" scam—one of the CTA's primary tactics to keep objecting teachers subsidizing the union's electioneering activities.[2]

In Mrs. Friedrichs' experience, when teachers ask their union representatives to become agency fee payers, union representatives simply instruct the teachers to "check the box" on a union membership card. Although this was the total instruction given by the union, it

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[2] *See* Alec Torres, *Teachers Challenge Compulsory Union Dues*, NATIONAL REVIEW (Dec. 17, 2013), available at http://www.nationalreview.com/article/366513/teachers-challenge-compulsory-union-dues-alec-torres.

was not the total process for becoming an agency fee payer. "Checking the box" does not invoke teachers' constitutional right to pay reduced agency fees. "Checking the box" merely prevents the state from deducting additional monies from a teacher's wages for the union's political action committee.[3] In other words, "checking the box" is neither a simple means of resigning union membership nor of becoming an agency fee payer. It simply excuses an employee from one of the ways the union takes additional money to engage in overt political activity. Even after "checking the box," full union dues will be exacted from her wages and much of that money will be devoted to the union's non-chargeable expenses.

To truly exercise her *Abood* rights, a teacher must request, in a specifically worded letter, to be designated as an agency fee payer.[4] However, after agency fee payer status has been established, full membership fees and political dues are still withheld from the teacher's paycheck. There is another process to trigger a rebate of the political dues. The CTA does not inform teachers of the existence of this step. Teachers must discover this second step by asking other workers who have navigated the process. After establishing agency fee status, objecting teachers must also send an annual letter to CTA to request a rebate of the nonchargeable portion of the dues. That letter must be sent to the CTA between September 1 and November 15.[5] If a teacher does not follow the proper opt-out

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[3] *Id.* Ben Spielberg, Friedrichs and Bain *Explained*, 34 JUSTICE (Nov. 30, 2015) (discussing a sample CTA membership card), available at https://34justice.com/2015/11/30/friedrichs-and-bain-explained/.

[4] *Id.*

[5] *Id.*

procedures, the CTA keeps collecting the teacher's money. Only after following the proper procedures will the CTA send teachers a rebate for the political portion of their dues— which, until the money is returned, is an interest-free loan to the union, to spend on politics.[6]

Mrs. Friedrichs has also witnessed and endured union bullying. Although Mrs. Friedrichs opposed the CTA's activities, she initially joined the CTA so she could have a voice.[7] But anytime Mrs. Friedrichs, or any other teacher, challenged how the CTA spent their dues, the union would bully them by alienating and intimidating them. The CTA bullied Mrs. Friedrichs and other teachers like children on a playground when they questioned how the union leadership spent their dues, eventually leading Mrs. Friedrichs to file the lawsuit which presented the question of agency fees to this Court last year. *Friedrichs v. California Teachers Ass'n,* 135 S. Ct. 2933 (2015).

Mrs. Friedrichs' experience is not unique. Mr. Joseph Ocol, a math teacher and volunteer chess coach, was a member of the Chicago Teacher's Union. After a student at his school was shot outside the school building one afternoon, Mr. Ocol decided to provide students with a safe place to spend time after school before their parents got home. He built a competitive, after-school chess club. He provided snacks and his time at no cost to the school. In April 2016, the Chicago Teacher's Union called for a strike. Mr. Ocol decided that being with his students, who had a

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[6] *See* n. 2, *supra.*

[7] Penny Starr, *Teacher on Unions: "Felt Like Little Children Being Bullied on a Playground"*, CNSNEWS.COM (Aug. 13, 2014), available at http://www.cnsnews.com/news/article/penny-starr/teacher-unions-felt-little-children-being-bullied-playground.

competition in a few weeks, was too important. He crossed the picket line. Mr. Ocol said, "I did not join Chicago Public Schools to be a union member; I joined CPS to be a teacher, first and foremost." Following Mr. Ocol's brave decision to be with his students, he was treated with disdain by his coworkers, ranging from snide comments to false allegations of policy violations. The union fined Mr. Ocol for putting his students first. When he refused to pay, he was expelled from the union. However, the union continues to deduct dues from his paycheck to this day.

An opt-out scheme compels workers to affirmatively identify themselves if they oppose union speech. That places an easy target on their back for union intimidation and reprisals. Those who stand against the union endure bullying from pro-union teachers who paint them as "freeloaders."[8] Teachers opposed to union activities are left with two unfavorable choices: raise their voices and endure bullying or continue to subsidize the overt electioneering of an organization they oppose. If unions instead had to obtain every worker's affirmative consent before deducting union dues or fees, these pressures on free speech would not exist.

Mrs. Friedrichs and Mr. Ocol are two among 30 teachers, representing eight states, who have submitted this brief. These teachers want to end forced unionism because of the deceptive practices outlined

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[8] *See* Connor D. Wolf, *Teachers Unions Bully the Very Teachers They Claim to Protect*, THE LIBERTARIAN REPUBLIC (Feb. 29, 2016), available at http://thelibertarianrepublic.com/teachers-unions-bully-thevery-teachers-they-claim-to-protect/; *see also* Michael Finnegan, *Labor fears setback as Supreme Court hears case on union dues, fees*, LOS ANGELES TIMES (June 30, 2015), available at http://www.latimes.com/local/politics/la-me-pol-california-unions-20150701-story.html.

above and demonstrated in each of their lives. An opt-in system would solve the problems these public servants face. By requiring workers' affirmative consent before subjecting them to union dues, workers are enabled to make the choice that best fits their moral and political views without navigating complicated procedural hurdles. Requiring workers to opt in would also guarantee that, whatever schemes a union may devise, the public worker: (1) knows of her rights, and (2) knows how to exercise those rights. No amount of union scheming can obscure these guarantees. Opt-out schemes are not "carefully tailored to minimize the infringement of free speech rights." *Knox*, 567 U.S. at 313. They are carefully tailored to undermine workers' free speech rights. *Abood*, while errant, was well-intentioned. It set out to safeguard the free speech rights of public employees by letting them choose whether to support their union's electioneering activities. Unions have systematically used opt-out schemes to burden and undermine those rights. Meaningfully safeguarding public employees' rights against compelled speech requires this Court to allow dues deductions only after a public employee's affirmative consent.

B. The Freedom Foundation's Experiences In Washington, Oregon, And California After *Harris* Demonstrate That Eliminating *Abood's* Agency Fee Requirements Without Also Forbidding Opt-Out Schemes Does Not Preserve Workers' First Amendment Rights.

The Court should vacate *Abood*, but if it does so without also requiring workers' prior, affirmative consent to withhold dues from their wages, the rights of full-fledged public employees will be limited in the

same way as those of partial-public employees after *Harris*. In *Harris*, the Court honored the First Amendment rights of partial-public employees by refusing to extend *Abood*'s agency fee framework to partial-public employees. 134 S. Ct. at 2638. The Freedom Foundation informs *Harris*-affected workers in Washington, Oregon, and California of their rights and assists them in exercising those rights. However, just like Mrs. Friedrichs, Mr. Ocol, and countless other employees struggling to realize their First Amendment rights, *Harris*-affected workers who never chose to join a union unwittingly subsidize union political activity to the tune of millions of dollars. These union schemes have completely undermined *Harris* and, if left unaddressed, will do the same if this Court vacates *Abood*.

After *Harris*, the Foundation launched an ongoing outreach program to inform *Harris*-affected workers on the West Coast about their newly-acknowledged rights. This outreach includes mailings, emails, television, radio, social media communications, and door-to-door canvassing. When these workers learn of their *Harris* rights, they often choose to withdraw from union membership and dues payments.[9] Until the Foundation told them, most workers never knew they had a right to cease paying union dues. In fact, some workers never knew they were paying union dues or that they were represented by a union at all.

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[9] *See, e.g.*, Hana Kim, *Union leaders furious over door-to-door tactic targeting their members*, Aug. 3, 2016, available at http://q13fox.com/2016/08/03/union-leaders-furious-over-doorto-door-tactic-targeting-their-members/.

1. After Harris, SEIU redefined union membership, instituted an opt-out scheme, and continued seizing dues from thousands of home healthcare providers without their consent.

SEIU 775 ("SEIU") currently represents approximately 36,000 state-funded in-home caregivers in Washington,[10] who are virtually identical to the home care aides at issue in *Harris*. These caregivers provide in-home care to Medicaid recipients – usually family members or friends – allowing these individuals to live at home, rather than an institution. Prior to *Harris*, SEIU and the State of Washington automatically seized union dues or dues-equivalent agency fees from every caregiver's wages. Wash. Rev. Code 41.56.113(b)(i). After *Harris*, SEIU continues to do the same under the guise of an opt-out scheme. After this Court decided *Harris*, SEIU unilaterally re-classified every caregiver who had not specifically objected to paying union dues as a union member.[11] Overnight, thousands of caregivers who never joined SEIU nor consented to dues were full dues-paying SEIU members.

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[10] *See* Appendix, Table A.

[11] Letter from David Rolf, President, SEIU 775NW to Individual Providers (December 18, 2014), at 7 ("SEIU Healthcare 775NW's Constitution and Bylaws automatically grants you membership. . . While you need not sign a membership card, we strongly encourage you to do so") ("Mailer 1"), available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%20membership%20packet%20post-Harris%20-%20reduced.pdf.

SEIU has a contractual obligation to notify caregivers of their constitutional rights.[12] The "notice" the union currently provides is so insufficient it brings into question the good faith of the union. In August 2014, after *Harris*, SEIU sent all caregivers a 6-page letter.[13] After five pages of pro-union marketing, SEIU provided on page six the "notice" about caregivers' rights under *Harris*. Page six also explained SEIU's opt-out scheme, to which caregivers must adhere if they wish to exercise their *Harris* rights. However, this "notice" also severely cautions caregivers that "opting out" will cost their right to vote on the labor contract, and that "less than one half of one percent" of caregivers have decided to opt-out.[14] The insufficiency of this "notice" results from SEIU's pecuniary incentives, which are served if caregivers are ignorant of and intimidated by the opt-out process.

SEIU admits that its opt-out scheme allows it to collect union dues – a staggering 3.2% of wages[15] – from caregivers who have never consented to paying any dues. SEIU's leadership has testified that SEIU "does not differentiate among its members based on

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[12] *See* Current Collective Bargaining Agreement ("Current CBA"), § 4.1(B), available at https://www.ofm.wa.gov/sites/default/files/public/legacy/labor/agreements/17-19/nse_homecare.pdf.

[13] Letter from SEIU 775NW to Individual Providers (August 2014), available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20member%20mailer.pdf.

[14] *Id.*

[15] Per Section 3.2 of the SEIU Healthcare 775NW Constitution and Bylaws, the standard monthly dues rate for Washington Home and Community Based Care Workers was set at 3.2%. The Constitutional Dues Rate remains at 3% for all others unless reduced by the SEIU Healthcare 775NW Executive Board. *See* http://b.3cdn.net/seiumaster/5d63840477355f2f87_h1m6bhvfj.pdf.

whether they have filled out a membership application or card."[16] Indeed, since *Harris*, "SEIU 775 has treated all caregivers as Union members as long as they are paying full union dues. There is no requirement that a caregiver complete or sign any document to be a Union member if the caregiver is paying monthly union dues."[17] SEIU further admitted that 18% of the bargaining unit had not signed membership cards or consented to dues deduction.[18] This means SEIU was withholding full fees from approximately 6,120 caregivers who never actually joined the union or affirmatively consented to any aspect of union membership or dues deductions. Finally, SEIU exacted money from 43,000 total caregivers over the previous three years who had not consented to membership or dues deduction.[19] This makes sense. Before *Harris*, the entire bargaining unit had to pay dues or agency fees. After *Harris*, and SEIU's redefinition of "membership," nearly every caregiver in the bargaining unit continues to pay dues. Voluntary association counts for little when SEIU can redefine basic terms so radically.

The State also actively assists SEIU in recruiting caregivers to union membership. When caregivers first meet with the State to sign their employment contracts, and begin paid work for their clients, the State apportions fifteen minutes for SEIU

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16. Declaration of Adam Glickman in Support of SEIU Healthcare 775NW's Opposition to Plaintiffs' Motion for Class Certification, *Hoffman, et al. v. Inslee, et al.*, No. 2:14-cv-00200-MJP (W.D. Wash. Filed Feb. 11, 2014) ("Glickman Decl."), ¶ 13, available at http://www.myfreedomfoundation.com/sites/default/files/documents/Glickman%20Decl.%20in%20Centeno.pdf.

17. *Id.* at ¶ 8.

18. *Id.* at ¶ 11.

19. *Id.* at ¶ 26.

representatives to meet with the caregivers as well, occasionally even allowing the SEIU representatives to have one-on-one time with each caregiver.[20] Moreover, SEIU representatives lie to caregivers at mandatory training sessions by telling them they must pay dues to SEIU.[21] SEIU never mentions *Harris* at these sessions. Caregivers must endure these union membership pitches at their contracting appointments with the State, and at their state-mandated training and continuing education sessions.[22] As if that were not enough, the current CBA also requires that all state websites caregivers "might reasonably access" contain a link to SEIU's website, all state orientation materials distributed to caregivers must contain union membership applications, and the online payroll website must include SEIU notifications.[23] Paychecks mailed to a caregiver can also include union materials.

Not only do caregivers face an unrequested informational onslaught from SEIU, but caregivers are powerless to stop personal information from being distributed to the unions. The State discloses the name, address, phone number, email address, birthdate, gender, marital status, and social security number of every Washington caregiver to SEIU.[24] Armed with all that information, SEIU relentlessly barrages caregivers with more pro-union marketing and

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[20] *See* n. 12, *supra* at § 2.3.

[21] *See* Video14 and Article. "Video Footage Shows SEIU Lying to Individual Providers in State Mandated Training," Maxford Nelsen (July 7, 2015), available at https://www.youtube.com/watch?v=xs3PutxeyII&feature=youtu.be.

[22] *See* n. 12, *supra* at § 2.3; § 15.13(A).

[23] *Id.* at §§ 2.5-2.8.

[24] *Id.* at § 5.1.

political messaging. The State entirely ceded the duty of notifying caregivers of their constitutional rights under *Harris* to SEIU.[25] Moreover, the State's most recent agreements with SEIU force caregivers to go through the union if they wish to opt-out by refusing to stop withholding dues from the caregiver's paycheck without the union's authorization. This forces the caregivers to subject themselves to aggressive union re-recruitment efforts. A worker who never authorized her employer to deduct union dues cannot direct her employer to stop deducting union dues. Only the union can direct the state to stop the deductions.[26]

To effectively opt out, a caregiver must send a certified letter to the Union. If the letter arrives more than one month after the caregiver began working, the caregiver cannot reclaim the dues money she has already unwillingly paid. The State does nothing to inform caregivers of their rights, and instead entrusts that task to the union, the party with the strongest financial incentive to obscure that right.[27] Politically, the elected State officials who serve as caregivers' employers solely for the purposes of collective bargaining, Wash. Rev. Code 74.39A.270, benefit from the political largesse SEIU gathers from this deceptive dues-skimming scheme. These blatant conflicts of interests benefit every party but the caregiver – who is left isolated and uninformed about her constitutional rights.

One victim of this scheme is Miranda Thorpe, a Washington mother who became a caregiver to care for her daughter, Sarena. Sarena qualifies for public

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25. *Id.* § 4.1(B).

26. *Id.*

27. *Id.*

assistance due to her functional limitations. When Miranda chose to start accepting public assistance reimbursements for the care she provides to Sarena, she signed a contract with the State and met the other various requirements. At that time, Miranda received a union membership card from SEIU. She made the conscious decision not to sign the form. She chose not to be in the union. Notwithstanding her choice, she soon realized the State was deducting union dues from her wages, pursuant to SEIU's opt-out scheme. Upset that her choice had not been respected, she filed suit, arguing that the opt-out scheme violated Washington law. Ultimately, the Washington Supreme Court rejected her argument. *Thorpe v. Inslee*, 188 Wash.2d 282, 393 P.3d 1231 (2017), *reconsideration denied* (July 7, 2017).[28] Miranda has now affirmatively opted out of union membership and dues payments, but she should not have had to *affirmatively* do so. Miranda, like thousands of other caregivers unburdened by agency fee obligations after *Harris*, have deliberately chosen not to join unions but have nonetheless been forced to subsidize union political speech because of opt-out schemes. If the Court vacates *Abood* but does not condition dues seizures upon employees' prior, affirmative consent, the same will be true for hundreds of thousands of full-fledged public employees nationwide.

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[28] Other Washington caregivers unsuccessfully challenged the constitutionality of SEIU's opt-out scheme in federal court. Amended Order on Motions for Summary Judgment, *Hoffman v. Inslee*, C14-200-MJP, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016). Amici believe that case was wrongly decided.

2. *SEIU Engages In Abusive Litigation Tactics To Prevent The Workers It Represents From Learning Of Their Harris Rights.*

Because neither the State of Washington nor the unions have been forthright with caregivers, the Foundation launched a multi-faceted outreach program to inform them of their *Harris* rights. To facilitate this program, the Foundation seeks lists of caregivers and other *Harris*-affected workers from the State pursuant to Washington's Public Records Act.[29] These home-based caregivers do not share any common workplaces, so the only way to identify and communicate with them is to obtain their information from the State. Under current law, only SEIU and SEIU-approved entities may obtain from the State any information about Washington's *Harris*-affected workers. Wash. Rev. Code 42.56.640;645.

Immediately after *Harris*, the Foundation requested lists of caregivers and other *Harris*-affected workers to begin communicating with them about their rights. Under state law, the State should have produced those records to the Foundation within five business days. The Foundation received the list of caregivers 819 days after its request.[30] What caused this 814-day delay? SEIU and the State of Washington. First, the state intentionally delayed disclosing the list to allow SEIU time to file suit and seek an injunction barring release of the caregiver list. Such delay violates state

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[29] WASH. REV. CODE 42.56 *et seq.* *See SEIU Healthcare 775 NW. v. Dep't of Soc. & Health Servs.*, 377 P.3d 214, 218 (Wash. Ct. App. 2016).

[30] Motion for temporary restraining order at 6, *Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131 (W.D. Wash. April 5, 2017) ("Mot. for TRO").

law.[31] Second, SEIU embarked on a litigation strategy that could be a case study in delay. SEIU lost at the trial court, but obtained a stay to preserve the fruits of its appeal. It again lost at the Court of Appeals, but succeeded in delaying release of the caregiver list until it could ask the Washington Supreme Court for discretionary review. When the Supreme Court unanimously denied review, the State finally produced the caregiver list to the Foundation.[32]

By the time the State disclosed the list to the Foundation, it was more than two years out-of-date. The caregiver bargaining unit fluctuates by as much as 40% annually, and the State believed it need only provide a list that was current as of the date of the Foundation's request.[33] Thus, after litigating successfully for over two years, the Foundation was able to communicate with only a small number of caregivers. Immediately after it received this outdated list, the Foundation made a new request to the State for a current list of caregivers.[34] SEIU sued again, repeating several of the same, failed arguments. The union lost at the trial court, but successfully obtained another appellate stay to preserve the fruits of its appeal.[35] SEIU's abusive litigation tactics have also been applied to other requests of information. The Foundation

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31. *Freedom Foundation v. Washington State Dept. of Social and Services*, 2016 WL 9384078, Wash.Super.Ct. (Wash. S. Ct. Dec. 9. 2016).

32. *SEIU 775 NW*, 377 P.3d at 230, *review denied*, 186 Wash. 2d 1016 (2016). Mot. for TRO, pg. 6.

33. *See* n. 30, *supra*.

34. Decl. of Maxford Nelsen in Support of Mot. for TRO ¶ [illegible], *Boardman v. Inslee*, Case 3:17-cv-05255 BHS, 2017 WL 1957131 (W.D. Wash. April 5, 2017) ("TRO Documentation").

35. *SEIU 775 v. Lashway*, No. 16-2-04312-34 (Thurston Cnty. Superior Ct. Oct. 27, 2016).

regularly requests the schedules of caregiver contracting appointments with the State, during which the caregivers face considerable union pressure to sign membership cards.[36] The Foundation routinely leaflets outside these state facilities, hoping to give caregivers some information about their constitutional rights before they sign a membership card. SEIU sued to prevent those requests, too. The union lost on the merits, but successfully obtained procedural stays that delayed disclosure long enough for many appointment dates to pass.[37] Thus, the Foundation received schedules for many appointments that had already occurred, which eliminated its ability to communicate with many caregivers.

The same is true for other *Harris*-affected workers, like family childcare providers. The Foundation successfully obtained one list of childcare providers from the State after *Harris*, but every subsequent request for updated lists has met the same predictable SEIU response: delay-motivated, frivolous litigation. Even some childcare providers who routinely requested lists of their fellow providers were sued, on multiple occasions, to prevent disclosure. *SEIU 925 v. DEL & Shannon Benn* Thurston Co. Superior Ct. No. 16-2-01416-34 (Apr. 22, 2016); *SEIU 925 v. DEL & Shannon Benn* Thurston Co. Superior Ct. No. 15-2-00283-7 (Feb. 12, 2015). Since *Harris*, SEIU has aggressively fought every attempt to release worker information to any entity but itself. Earlier this year, a U.S. District Court recognized SEIU's tactics. *See Boardman v. Inslee,* No. C17-5255 BHS,

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[36] SEIU 775 v. State Dep't of Soc. & Health Servs., 396 P.3d 369 review denied sub nom. SEIU 775 v. State, 189 Wash. 2d 1011, 402 P.3d 828 (2017).

[37] *See* n. 30, *supra*.

2017 WL 1957131 (W.D. Wash. April 5, 2017) at *3 (noting that "the SEIU unions have used litigation tactics to prolong the release of the public records that are the underlying subject of this lawsuit, so that the records became outdated and useless by the date of their disclosure . . .").

3. Politically Powerful Government Unions Game The System To Keep Workers In The Dark About Their Rights.

Unions in Washington, Oregon, and California use more than just litigation to prevent *Harris*-affected workers from learning their rights. In all three states, the unions have passed legislation designed to prevent workers from exercising their First Amendment rights.

a. SEIU bought a statewide ballot initiative in Washington to prevent *Harris*-affected workers from learning of their First Amendment rights.

SEIU knew its litigation strategy would ultimately fail, and the Foundation would eventually obtain current caregiver lists, pursuant to Washington public records law. So, SEIU decided to change the public records law. After aggressive lobbying failed to convince the legislature to amend the records law and conceal caregiver identities, SEIU turned to the statewide ballot initiative process, pouring nearly $2 million[38] into creating and funding Initiative 1501

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[38] Of the $1,883,888.15 received by the pro-1501 political action committee during the 2016 election, all but $50 came from SEIU 775 and SEIU 925. Mot. for TRO at 7.

("I-1501").[39] Ostensibly, I-1501 stiffened criminal and civil penalties for identity theft perpetrated against seniors or other vulnerable individuals. Its true purpose was to eliminate the Foundation's access to worker information, once and for all. This is obvious from the text of the initiative, which prohibited disclosure of caregivers' names, not just seniors' or vulnerable persons' names – which were already barred from disclosure. After I-1501, only SEIU may obtain any homecare or childcare provider information from the state.[40] The pro-1501 campaign was chaired by a SEIU officer.[41] Every Washington newspaper recognized that I-1501 was truly intended to stop the Foundation's outreach to *Harris*-affected workers.[42] Washington voters approved I-1501, and, consequently, no one other than SEIU can obtain lists of

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[39] *Id.*

[40] WASH. REV. CODE 42.56.645(1)(d).

[41] Decl. of Adam Glickman in Support of Campaign to Prevent Fraud & Protect Seniors Mot. to Intervene ¶ 2, *Boardman*, No. 3:17-cv-05255 (W.D. Wash. April 10, 2017).

[42] TRO Documentation at Exhibit G. Editorials from *The Seattle Times*, *The Columbian*, *The Spokesman-Review*, and *The Stranger*, urging readers to vote against I-1501. *The Seattle Times* described I-1501 as "a Trojan horse" that is "being run by a deep-pocked special interest group [SEIU] that wants to weaken the state [PRA]." *The Columbian* wrote that I-1501 was designed to protect unions, explaining that "Union officials would prefer that members not be informed that they no longer can be forced to pay dues to SEIU." *The Stranger* noted that I-1501 is "*really* about something other than keeping old people safe... I-1501 is a bad idea." Ashley Gross, *How A Fight Between SEIU 775 And A Conservative Think Tank Led To An Initiative On Identity Theft*, KNKX.org (Jul. 8, 2016), available at http://knkx.org/post/how-fight-between-seiu-775-and-conservative-think-tank-led-initiative-identity-theft.

Harris-affected workers. *Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *1.

b. Oregon amended its laws after *Harris* to prevent *Harris*-affected workers from learning of their First Amendment rights.

In December of 2014, the Foundation requested a list of Oregon's *Harris*-affected workers, represented by SEIU 503, pursuant to the Oregon Public Records Act, O.R.S. T. 19, Ch. 192.[43] The Foundation acknowledged that it intended to notify these workers of their rights. The State first concluded that the law required it to disclose the requested list.[44] However, after this determination, the State stalled for several months, and did not disclose the records.[45] Meanwhile, the Oregon legislature – at the behest of SEIU 503's leadership – introduced HB 3037, which prevented disclosure of *Harris*-affected worker lists.[46] The Foundation repeatedly asked the State for updates on its request, and the State responded that it had been too busy to respond.[47]

HB 3037 was designated an "emergency" action, "necessary for the *immediate* preservation" of the

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[43] The Oregonian conducted extensive reporting on this case, which included several important documents referenced below, available at, http://media.oregonlive.com/opinion_impact/other/2015/12/02/request.pdf.: http://www.oregonlive.com/opinion/index.ssf/2015/12/government_transparency_oregon.html (Hereinafter, "Oregonian article").

[44] Oregonian article, *supra*, note 43.

[45] *Id.*

[46] *Id.*

[47] *Id.*

public interests at stake.[48] Apparently, the emergency was the possibility that Oregon workers might learn about and exercise their rights to withdraw union membership and financial support. Indeed, SEIU's Oregon Political Organizer supported HB 3037 by transmitting information between the legislature and affected state agencies.[49] The State delayed disclosing the records to the Foundation long enough to change its laws and frustrate the Foundation's lawful request. When the State finally responded to the Foundation, it explained it had no responsive records because HB 3037's newly created exemptions barred disclosure of the requested records. The State even admitted that the Foundation's request was delayed as the State tracked the progress of HB 3037.[50]

This episode demonstrates the immense political power and temerity government unions wield. Pair that with an opt-out scheme, and most workers will never learn the truth about their rights. Requiring workers' affirmative consent before dues are seized from their wages encourages three good outcomes: (1) employees will be given a meaningful choice about union membership and dues payments; (2) unions will work to earn workers' support, rather than work to render workers' support a nullity; (3) public officials and government unions will resume adversarial relationships that benefit – rather than gang up on – workers. Allowing the persistence of opt-out schemes

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[48] *Id.*

[49] Affidavit of Anne Marie Gurney, in support of Plaintiff's Complaint, at 9-10, *Gurney v. Oregon Department of Health Services*, (No. 15CV31969) (Or. Cir 2015).

[50] Oregonian article, *supra*, note 43.

incentivizes harmful behavior that violates workers' constitutional rights.

c. Before *Harris*, California amended its public records law to exempt all *Harris*-affected workers from disclosure, and in anticipation of this case, it has done the same for all of California's public employees.

Immediately before this Court decided *Harris*, the California Legislature amended its public records law to exempt from disclosure all information related to *Harris*-affected workers.[51] Thus, hundreds of thousands of these affected workers are entirely uniformed of their First Amendment rights to choose whether they will financially support a union. In advance of this case, the California Legislature this year enacted A.B. 119[52], which exempts public employees' names and contact information from disclosure, but requires that the state provide the unions with access to any new state employees' information. Furthermore, the new law requires all state employers to facilitate face-to-face meetings for all newly hired state employees and the appropriate union. This is hardly behavior one would expect from organizations supposedly devoted to advancing workers' interests, but it is unsurprising, given that the CTA has spent tens of millions of dollars opposing ballot initiatives that would prohibit opt-out schemes.[53] Aided by opt-out schemes, these unions will

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[51] CAL. GOV'T CODE § 6253.2.

[52] Available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB119

[53] *See California Proposition 32, The "Paycheck Protection" Initiative (2012)*, Ballotpedia.org (CTA spending $21 million

continue to seize dues from workers while simultaneously blocking them from receiving any neutral information about their rights related to those dues.

d. Many workers choose to opt out of union membership and dues payment obligations when they learn of their right to do so, which demonstrates that opt-out schemes designedly compel workers to subsidize speech against their wishes.

When workers learn of their First Amendment right to opt out of union membership and dues payments, they often do so in overwhelming numbers.[54] *Harris* opened the door for hundreds of thousands of partial-public employees to choose, for the first time, whether they wanted to support a union. But opt-out schemes and unions' accompanying anti-information campaigns have dramatically undermined the rights *Harris* acknowledged. If no one knows about the door, no one can walk through it.

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dollars to prevent an opt-in requirement), available at https://ballotpedia.org/California_Proposition_32,_the_%22Paycheck_Protection%22_Initiative_(2012). *See also California Proposition 75, Permission Required to Withhold Dues for Political Purposes (2005)*, Ballotpedia.org (CTA spending $12 million dollars to prevent an opt-in requirement), available at https://ballotpedia.org/California_Proposition_75,_Permission_Required_to_Withhold_Dues_for_Political_Purposes_(2005).

[54] Maxford Nelsen, *Thousands of Workers Leave SEIU Due to the Freedom Foundation Outreach*, Freedom Foundation, Oct. 7, 2015, available at https://www.freedomfoundation.com/labor/thousands-of-workers-leave-seiu-due-to-freedom-foundation-outreach/.

After *Harris*, SEIU 925, which represents Washington's family childcare providers, removed from its labor contract the agency shop provision that compelled all childcare providers to pay union dues or fees. Immediately, the State and union ceased deducting dues from 38.4% of childcare providers who never consented to membership. Today, because of the Foundation's outreach to these workers, 63.5% of childcare providers have opted out and no longer pay dues to SEIU 925. When given the right to make an informed decision, these workers leave the union in droves. *See* Appendix, Table A.

Conversely, after *Harris*, SEIU 775, which represents Washington home healthcare providers, removed its agency shop provision and replaced it with an opt-out scheme. Subsequently, SEIU 775 experienced virtually no downturn in membership numbers (a drop from 99.9% to 99.5%). Since 2014, the Foundation has obtained a few partial lists of home healthcare providers and conducted some limited outreach.[55] Today, only 11% of home healthcare providers have been able to opt out. *See* Appendix, Table B.

Only the opt-out scheme and the aggressive campaign to keep workers in the dark can explain the gross disparity between SEIU 925 and SEIU 775. SEIU 775 places the entire risk and burden on the worker – the only party with a First Amendment interest at stake. *See Davenport*, 551 U.S. at 185 ("[U]nions have no constitutional entitlement to the fees of nonmember employees."). This data shows that opt-out schemes force many workers to subsidize

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[55] *See* Brody Mullins, *Antiunion Campaign Goes Door-to-Door*, Wall St. J., Aug. 17, 2016, available at https://www.wsj.com/articles/antiunion-campaign-goes-door-to-door-1471454218.

union speech with which they fundamentally disagree. Such schemes fall woefully short of even the existing "procedural safeguards" to which unionized workers are entitled. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). Opt-out schemes facilitate and encourage compelled speech, the very issue at the heart of this case. On the other hand, opt-in schemes do not disadvantage any union that provides services workers are willing to support. Clearly, the chips should not be stacked entirely against speakers. SEIU 775's approach is as cunning as it is unconstitutional. To adequately safeguard First Amendment rights, this Court must vacate *Abood*, holding that union dues may be seized only after a worker's affirmative consent.

Harris is a forerunner to this case. The abusive tactics unions used after *Harris* to undermine and avoid its effect are the same tactics they will use after this decision. This Court should vacate *Abood*, but if it declines to address the issue of prior, affirmative consent, millions of public employees across the nation will join the ranks of their *Harris*-affected brethren: entitled to a robust First Amendment protection they know nothing about.

C. To Meaningfully Vacate *Abood*, The Court Should Allow The Seizure Of Dues Only After A Public Employee's Prior, Affirmative Consent, Which Would Already Be Required Under Several Other Precedential Cases.

Harris reaffirmed the "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party [e.g. a union] that he or she does not wish to support." 134 S. Ct. at 2644. At its

core, the First Amendment entitles every individual to a meaningful, voluntary choice whether to support another's speech. *Id.* at 2636. Compelling an individual to subsidize public-sector union speech compels that individual to subsidize core political speech because "in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government." *Id.* at 2632-33. *Abood* should be vacated because it was wrongly decided; it permits what the First Amendment forbids. *Id.* at 2632-33. This Court has long recognized *Abood*'s conceptual and practical problems. To address those problems, the Court has attempted to create and administer "carefully-tailored" "procedural safeguards" to prevent compelled subsidization of political speech. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2291 (2012) (any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights); *see generally Harris*, 134 S. Ct. at 2633. The fact is, opt-out schemes exacerbate the infringement of free speech rights by compelling subsidization of political speech. If the Court rules that the First Amendment prohibits compelling public employees to subsidize any union activities, then the First Amendment will also prohibit opt-out schemes. This Court has noted that acceptance of the opt-out approach appears to have come about more as a "historical accident than through the careful application of First Amendment principles." *Knox*, 567 U.S. at 312. The same careful application of First Amendment principles that vacates *Abood* must necessarily disallow opt-out schemes.

1. The Court's decisions in Knox and Davenport will apply to the collection of all public-sector union dues, once Abood is overturned.

In *Knox*, this Court acknowledged that opt-out schemes constitute a "substantial impingement on First Amendment rights." *Knox*, 567 U.S. at 317. Echoing *Hudson*, the *Knox* Court reiterated that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights. *Id.* at 313. Quoting *Ellis*, the Court restated that "given the existence of acceptable alternatives, a union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Id.* at 321 (*quoting Ellis v. Railway Clerks*, 466 U.S. 435 at 444, 104 S.Ct. 1883 (1984)). The Court in *Knox* further explained that opt-out schemes create a risk that nonmembers will pay union fees "to further political and ideological ends with which they do not agree." *Id.* at 312. According to *Hudson*, that risk is constitutionally unacceptable. *Id.* Indeed, *Knox* makes clear that any supposed judicial acceptance of opt-out schemes may, at best, only be understood as the product of "historical accident," not "the careful application of First Amendment principles." *Id.*

This Court should overturn *Abood* because all public-sector union activities are inherently political. *Harris*, 134 S. Ct. at 2632-33. As explained above, unions will respond to such a ruling by enacting opt-out schemes and simply redefining "membership" to include any bargaining unit employee who has not affirmatively objected. This creates the very risk of overinclusion *Hudson* and *Knox* declare unacceptable; namely, that some employees' monies will be seized

and used, even temporarily, to fund ideological activities they do not support. *Knox*, 567 U.S. at 312. *Hudson*, 475 U.S. at 305.

Conversely, opt-in systems entirely eliminate this risk. Certainly, absent opt-out schemes, unions risk losing some dues payers. But unions should bear this risk because their interests in collecting dues do not outweigh the interests of employees "whose constitutional rights are at stake." *Knox*, 567 U.S. at 321. *Davenport*, 551 U.S. at 185 (holding that "unions have no constitutional entitlement to the fees of nonmember-employees."). Also, given unions' penchant for redefining terms like "membership," it is important to remember that "the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full." *Knox*, 567 U.S. at 317. An employee may deliberately choose not to consent to union membership and dues payments, yet under an opt-out scheme this same employee can still be considered a full dues-paying union member. That same employee may only later realize that her money is being used to fund ideological activities she does not support. By the time of this realization, the damage will have already been done. Even repayment of her dues would not "undo the violation of [her] First Amendment rights." *Id*. That is exactly what happened to caregiver Miranda Thorpe, *supra*. The only way to prevent this clear and present threat to employees' First Amendment rights is to require prior, affirmative consent for dues deductions.

Thus, in overturning *Abood*, this Court should hold that no union dues or fees may constitutionally be withheld from an employee's wages absent her prior, affirmative consent. This would be entirely consistent with the longstanding principle that courts "do not

presume acquiescence in the loss of fundamental rights." *Id.* at 312 (citing *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 307 (1937). Union fees collected pursuant to an opt-out scheme run afoul of this presumption.[56]

Not only would this holding align with precedent, it would align with common sense. An individual may not be automatically deemed a member of a private association until she chooses to become a member. An association certainly has the right under the First Amendment to express its views without government interference. *Knox*, 567 U.S. at 321-22. But an association may not compel an individual who has chosen not to join, to pay for its expression. *Id.* The individual's acquiescence may not be presumed. This Court would not allow a political party to administer – in cooperation with a government controlled by that party – an opt-out process whereby all citizens are assessed a party membership fee until they affirmatively object. That party could argue that its work benefits those non-consenting "members." That party could contend that by having virtually every citizen pay in, it makes the party more responsive to the people and their needs. But political parties – like public-sector unions, are in the business of political speech, so the First Amendment would not permit such an assessment. Our constitutional system

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[56] The proposition that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," arose from a statutory enforcement case and has never been adopted by this Court in a public employee's First Amendment challenge to an opt-out scheme. *Knox*, 567 U.S. at 313 (quoting *Machinists v. Street*, 367 U.S. 740, 774 (1961)).

encourages individuals to join others in private associational expression. But it emphatically disallows a private association to fund, even temporarily, its expression on the backs of individuals who have not voluntarily consented.

2. Opt-out schemes cannot withstand exacting scrutiny.

"Measures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest." *Knox*, 567 U.S. at 314. Any scheme that allows unions to forego an employee's prior, affirmative consent is significantly broader than necessary. Experientially, the Court should observe the difference in sustained union membership between SEIU 775 (opt-out) and SEIU 925 (opt-in) after *Harris*. *See supra*. This evidence clearly establishes that among "employees who might not qualify as active 'dissenters,'" there are many "who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union." *Id.* at 313. This conclusion is bolstered by social science. Unions routinely employ "choice architecture" and manipulate the "status quo bias" to bolster their membership numbers and revenue. For instance, both SEIU 775 and the CTA create default options – union membership and full dues payments – that resultantly trap significant portions of affected workers into membership and dues payment obligations they would otherwise reject. Brief of the Freedom Foundation and Dr. John Balz, Amicus Curiae, p. 14, *Friedrichs v. California Teachers Association*, 136 S.Ct. 566 (2015) 2015 WL 5440193.

Opt-out schemes will always be significantly broader than simply asking permission. That is, of course, why

unions prefer opt-out schemes. But that is also why they violate the First Amendment.

CONCLUSION

Opt-out schemes are carefully tailored to undermine workers' free speech rights, as unions have illustrated for decades. These schemes compel many workers to subsidize political speech they do not support. If *Abood* is overturned and all public employees are given the right to choose whether they will financially support unions, that right should be meaningfully safeguarded. If compulsory agency fees are unconstitutional under the First Amendment, then government employers and unions should have to obtain workers' prior, affirmative consent to seize union dues from their wages. If compulsory union fees substantially impinge workers' First Amendment rights, then government employers and unions may not constitutionally presume workers' acquiescence in the loss of those rights.

Respectfully submitted,

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APPENDIX

APPENDIX

Table A tabulates the total percentage of SEIU 925's monthly dues payers and non-members between July 2014 and September 2017. Table B tabulates the total percentage of SEIU 775's monthly dues payers and non-members between July 2014 and September 2017. This data was compiled from public records ob-tained from Washington State.

Table A
Percentages of Childcare Providers who pay membership dues to SEIU 925

Month	Members	Members	Non-Members	Non-Members
Jul-14	6633	100.0%	0	0.0%
Aug-14	4212	61.6%	2629	38.4%
Sep-14	4499	66.9%	2229	33.1%
Oct-14	4275	64.2%	2387	35.8%
Nov-14	4306	63.7%	2453	36.3%
Dec-14	3739	54.7%	3097	45.3%
Jan-15	3675	55.0%	3149	45.0%
Feb-15	3607	54.0%	3074	46.0%
Mar-15	3609	53.4%	3145	46.6%
Apr-15	3622	52.8%	3235	47.2%
May-15	3738	53.2%	3286	46.8%
Jun-15	3567	51.3%	3385	48.7%
Jul-15	3577	50.8%	3463	49.2%
Aug-15	3451	48.6%	3652	51.4%
Sep-15	3367	48.0%	3651	52.0%

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Oct-15	3218	46.6%	3687	53.4%
Nov-15	3177	44.8%	3922	55.2%
Dec-15	3088	43.2%	4061	56.8%
Jan-16	3060	43.1%	4034	56.9%
Feb-16	2976	42.5%	4028	57.5%
Mar-16	2926	41.5%	4128	58.5%
Apr-16	2921	41.8%	4070	58.2%
May-16	2890	40.8%	4189	59.2%
Jun-16	2890	40.7%	4204	59.3%
Jul-16	2897	41.0%	4172	59.0%
Aug-16	2912	40.9%	4213	59.1%
Sep-16	2837	39.8%	4284	60.2%
Oct-16	2817	40.2%	4197	59.8%
Nov-16	2773	38.7%	4401	61.3%
Dec-16	2707	37.8%	4452	62.2%
Jan-17	2638	36.8%	4533	63.2%
Feb-17	2602	36.8%	4464	63.2%
Mar-17	2594	36.8%	4450	63.2%
Apr-17	2576	36.4%	4500	63.6%
May-17	2612	37.7%	4322	62.3%
Jun-17	2574	37.2%	4350	62.8%
Jul-17	2554	36.9%	4372	63.1%
Aug-17	2501	36.5%	4347	63.5%
Sept-17	2457	34.9%	4590	65.1%

Table B
Percentages of caregivers who pay dues to SEIU 775

Month	Members	Members	Non-Members	Non-Members
Jul-14	33483	99.9%	48	0.1%
Aug-14	33558	99.5%	173	0.5%
Sep-14	33239	98.7%	421	1.3%
Oct-14	33193	98.1%	653	1.9%
Nov-14	33167	98.0%	678	2.0%
Dec-14	33232	97.9%	706	2.1%
Jan-15	33301	97.8%	741	2.2%
Feb-15	33121	97.8%	753	2.2%
Mar-15	33108	97.5%	844	2.5%
Apr-15	33400	97.4%	881	2.6%
May-15	33442	97.5%	862	2.5%
Jun-15	34901	97.5%	909	2.5%
Jul-15	33677	97.0%	1052	3.0%
Aug-15	33725	97.0%	1056	3.0%
Sep-15	33634	96.7%	1134	3.3%
Oct-15	33708	96.7%	1153	3.3%
Nov-15	33659	96.6%	1181	3.4%
Dec-15	33777	96.6%	1195	3.4%
Jan-16	33912	96.5%	1223	3.5%
Feb-16	33761	96.4%	1268	3.6%
Mar-16	33721	96.1%	1368	3.9%

Apr-16	31879	94.2%	1956	5.8%
May-16	32460	94.2%	1984	5.8%
Jun-16	32678	93.9%	2132	6.1%
Jul-16	31144	89.1%	3797	10.9%
Aug-16	30887	89.1%	3764	10.9%
Sep-16	31477	86.2%	5045	13.8%
Oct-16	32061	88.1%	4321	11.9%
Nov-16	31617	89.5%	3729	10.5%
Dec-16	32307	89.4%	3834	10.6%
Jan-17	32520	89.3%	3891	10.7%
Feb-17	31975	89.0%	3958	11.0%
Mar-17	32211	88.4%	4220	11.6%
Apr-17	32148	88.6%	4131	11.4%
May-17	32854	88.7%	4188	11.3%
Jun-17	32201	88.4%	4223	11.6%
Jul-17	32807	88.8%	4124	11.2%
Aug-17	33532	89.0%	4165	11.0%
Sept-17	33542	89.1%	4098	10.9%